87-1839

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

JOHN DOE # 1 AND JOHN DOE # 2,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

May a corporation disclose to the government statements of its employees made to attorneys who, although retained by the corporation, advised the employees that their interests were identical with those of the corporation and that their statements could not be divulged because of the protections of the attorney-client privilege?

LIST OF PARTIES

The parties to the proceedings below were the same as in this Court.

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Petitioners John Doe # 1 and John Doe # 2 respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Cirucit, entered in the above entitled proceeding on January 26, 1988.

OPINIONS BELOW

The order denying the petition for rehearing, and the summary order of the Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Southern District of New York are reprinted in the appendix hereto.

The opinion and order of the District Court is also reprinted in the appendix hereto.

JURISDICTION

Petitioners moved to quash a *subpoena duces tecum* issued by a federal grand jury sitting in the Southern District of New York which directed the corporation[1] to produce memoranda of interviews of its employees, including those of petitioners. The interviews were conducted by lawyers hired by the corporation.

The United States District Court for the Southern District of New York denied the Motion to Quash by Order dated August 6, 1987. Petitioners appealed to the United States Court of Appeals for the Second Circuit which affirmed the decision of the District Court on January 26, 1988. Petitioners filed a timely Petition for Rehearing and Suggestion for *En Banc* Consideration. This Petition was denied on March 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTE INVOLVED

Rule 501 of the Federal Rules of Evidence provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles

[1]The name of the corporation is in the opinion of the District Court printed in the appendix hereto.

> of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT OF THE CASE

Petitioners are former officers of a division of the corporation, a large defense contractor with its principal offices in California. A grand jury convened in the Southern District of New York was investigating allegations that the division had defrauded the United States by inflating its costs in order to obtain higher prices in its government contracts. On July 6, 1987, it issued a *subpoena duces tecum* which required the corporation to produce memoranda of interviews of petitioners, John Doe # 3 and a fourth employee,[2] all of whom were officials of the division. These interviews were conducted and memorialized by lawyers hired by the corporation.

The four employees filed a Motion to Quash based upon their assertion that their statements were protected from disclosure by the attorney-client and joint defense privileges. The employees maintained that their statements could not be supplied to the government without their consent.

Following an evidentiary hearing, Judge John F. Keenan of the United States District Court for the Southern District of New York denied petitioners' motions, but granted that of John

[2]Although that employee testified on behalf of petitioners, he withdrew his Motion to Quash after he was granted immunity by the U.S. Attorney.

Doe # 3 although the evidence as to each employee was essentially the same. Judge Keenan held that the interview with John Doe # 3 had the "aura of attorney-client confidentiality" and that it would be "manifestly unfair" to deny him the privilege. The United States Court of Appeals for the Second Circuit affirmed Judge Keenan's decision by summary order. A petition for rehearing and a suggestion for *en banc* consideration was denied.

The interviews memorialized in the subpoenaed memoranda occurred on August 5, 1986 at the division's plant. The lawyers were hired by the corporation to conduct them after one of its internal auditors learned from petitioner John Doe # 2, in late July, that the division may have overcharged the government.

Shortly before the interviews were conducted, Deputy Secretary of Defense William H. Taft IV promulgated a new policy by letter dated July 24, 1986 encouraging the voluntary disclosure of fraud to the Department of Defense. The letter, which was sent to the corporation, stated that voluntary disclosure might avoid debarment from doing business with the government. However, in order to obtain this favored treatment, the policy provided that the disclosures must come from the contractor and not an individual employee. (*See*, A 16-21). [3]

In order to obtain the benefits of the voluntary disclosure program, the corporation chose not only to reveal the existence of the potential fraud but also to supply the government with the statements of its employees. It appears that this decision was made even before the interviews were conducted. A group executive for the corporation, stated in his affidavit that he

[3]References preceded by "A" are to the Joint Appendix to the Briefs filed in the Court of Appeals.

and another corporate manager had decided by August 1, 1986 that there "was not going to be any cover-up." But none of the employees were told by the lawyers that the corporation intended or was even considering transmission of their confidential disclosures to the government. Nor were they advised that if they reported evidence of wrongdoing to the government, this would conflict with the corporation's ability to obtain the benefits of the voluntary disclosure program. Instead the corporation's lawyers strictly admonished the employees to keep their statements and information confidential. (*See*, A 241).

The lawyers who conducted the interviews had substantial experience in internal corporate investigations. They prefaced their many interviews of corporate employees with a standard introduction. They told John Doe # 3, an officer and employee of 31 years with the division, that "at this point, the company and employees' interests are one and the same." (A 226). They informed petitioner, John Doe # 2 that the "[company] will stand behind [you]" and that the company would "support him if he acted in what he believed was the company's best interest." (A 28). They told Petitioner John Doe # 1, an officer for 16 years and an employee for 31, that "we are all on the same team" (A 242), and questioned him in a "deferential and nonconfrontational style." (A 24).

The corporation's lawyers never explained that representation of the company did not include representation of the company's officials. Comments by the attorneys that the interests of these employees and the company were the same blurred such distinction in the minds of the petitioners. Moreover, while the lawyers stated that the attorney-client privilege to which the interviews were subject, was the company's "to waive or protect," they did not explain that this meant the

company might disclose the employees' statements to anyone outside the corporation, including the government. Indeed, they assured the employees to the contrary, advising them that anything said was confidential and could not be divulged to anyone.

During the course of the interviews both petitioners indicated an expectation that these lawyers would be providing personal legal advice to them. John Doe # 1 expressed his personal hope that they were good lawyers (A 235), and John Doe # 2 asked their advice about hiring separate counsel. (A 86).

After the corporation had obtained the statements from its employees, it advised them to retain separate counsel. Petitioners as well as John Doe # 3 and the fourth employee did this, and when their individual attorneys met with the corporation's lawyers afterwards, the memorandum of each employee's interview was given to his lawyer. The company's lawyers announced that this was being done pursuant to a joint defense privilege.

REASONS FOR GRANTING THE WRIT

The decision below that petitioners did not have an attorney-client privilege in their statements to counsel for their corporate employer (a) fails to adapt the privilege to the corporate setting, and (b) conflicts with decisions of other Circuits.

The Court should grant this petition because of the importance of the questions raised to the countless investigations of alleged corporate wrongdoing conducted by corporate counsel, and to resolve the evolving conflict in the Circuits over when a joint attorney-client privilege arises on behalf of the corporation and its employees. In addition, the conflict between

corporations and their employees created by the government's new voluntary disclosure program makes the time ripe for clarification of the application of the privilege in the corporate world.

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), this Court acknowledged the dificulty of applying the attorney-client privilege in the corporate setting: "Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual, . . ." *id.* at 390. The grave consequences of a difference in the application of the privilege to individuals as distinguished from corporations was not adequately explained to petitioners. The Court should grant this petition to establish guidelines for advice to corporate employees whose communications to corporate counsel in the course of an investigation may thereafter be disclosed without their consent.

In *Upjohn, supra*, this Court recognized that the purpose of the privilege was "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." The protection of the privilege was extended to communications between corporate counsel and all employees to enable the corporation to receive fully-informed legal guidance. But employees at any level of the corporation would be foolish to engage in a "full and frank" discussion with corporate counsel if the subsequent use of that discussion is entirely beyond their control.

This Court has held that it is corporate management which controls the disclosure of privileged communications between its counsel and corporate officials. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985). But the Court has not considered under what circumstances it would be un-

fair to deny corporate officials the right to share control of that privilege.

This issue must be analyzed against the backdrop of the realities of the corporate world. Managers and officials of a corporation identify strongly with the "artificial creature of the law." They see themselves as the individuals who create, articulate and implement corporate policy. When speaking to counsel for the corporation about conduct in the scope of their employment, this perception of an identity of interest naturally creates a sense of trust between them and corporate counsel.

Lawyers hired by the corporation understandably depend upon this spirit of corporate loyalty to facilitate their investigation. Here the lawyers explained to the employees that the "interests of the corporation and the employees, were, at this point, one and the same," that they were "all on the same team" and that the corporation would "stand behind" them. The lawyers interviewed petitioner John Doe # 1, who devoted 31 years to the division, including 16 as an officer, in a "deferential and non-confrontational manner." They told all the employees that their communications to them were "privileged" which, the lawyers explained, meant that they could not be forced to divulge their contents to anyone.

This explanation of the protection afforded by the privilege was obviously provided because the lawyers intended for petitioner to rely upon it. It certainly was not necessary in order to perfect the privilege. Apparently, the lawyers felt the need to assure the petitioners of their ability to resist disclosure in order to obtain petitioners' complete candor. Fairness and the reasons for the privilege require that the lawyers not be permitted to disclose to the government information obtained from petitioners after having explained that they could not be forced to divulge it.

It is insufficient for counsel to advise employees in a perfunctory manner, as was done here, that counsel represents the corporation and the attorney-client privilege is the corporation's to waive or protect. When this advice is given to individuals who strongly identify with the corporation and is coupled with references to unity and an assurance that the lawyers "cannot be forced to divulge" any communications, the Court should hold that an attorney-client relationship with a concomittant privilege is created between the corporation's officials and its lawyers.

The fact that the petitioners did not seek out or approach the lawyers is not dispositive of the existence of an attorney-client relationship. In *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318 (7th Cir. 1978), the court observed that, "The client is no longer simply the person who walks into a law office. A lawyer employed by a corporation represents the entity but that principle does not of itself solve the potential conflicts existing between the entity and its individual participants." The court also stated, "The professional relationship for purposes of the privilege for attorney-client communications 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice' " *id.* at 1319. In a footnote to this sentence, the court quoted the following language from R. Wise, *Legal Ethics* 284 (1970): "The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought." *id.* at 1319, n. 14.

Petitioners entertained the reasonable belief that they were revealing confidential information regarding their conduct on behalf of the corporation to lawyers who would look after their interests as well as those of the corporation. Both "manifested an intention to seek professional legal advice." John Doe # 1 stated, "I hope you guys are good" and John Doe # 2 sought legal advice as to whether he needed a separate attorney.

Several courts have recognized that corporate employees may have a privilege in statements made to corporate counsel if they reasonably believe that counsel was representing them as well as the corporation. *See, Diversified Industries, Inc. v. Meredith,* 571 F.2d 596 (8th Cir. 1977); *Eureka Investment Corporation, N.V. v. Chicago Title Insurance Co.,* 743 F.2d 932 (D.C.Cir. 1984); *Odmark v. Westside Bancorporation, Inc.,* 636 F. Supp. 552 (W.D.Wash. 1986). This recognition of the possibility of such a joint privilege conflicts with the holding in *Matter of Bevill, Breshler & Schulman Asset Manag.,* 805 F.2d 120 (3rd Cir. 1986), which was the only case cited by the Court of Appeals here.

In *Bevill,* the court approved the test adopted by the district court for determining whether a corporate officer may assert a personal claim of attorney-client privilege as to communications with corporate counsel. This test requires, *inter alia,* that the corporate officers "show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company." The court explained that this test did "not invade the personal privilege of the officers because they do not have an attorney-client privilege with regard to comunications made in their role as corporate officials" [citation omitted] *id.* at p. 125.

The use of such a test is irreconcilable with the reasoning of those Circuits which have recognized the existence of a joint privilege in the corporate setting. The court in *Bevill* relied upon the fact that "a corporation can act only through its agents" to support its conclusion that "communications by corporate officials about corporate matters and their actions in the corporation" comprise the corporation's privilege over which the officials have no control. In reaching this conclusion, however, the court ignored the fact that corporate officials will be prosecuted and punished in their individual

capacities for unlawful conduct which they engaged in on behalf of the corporation. They are not insulated from the consequences of their conduct simply because it was carried out in their representative capacities. Employees' incriminating statements about their corporate behavior can be used not only against the corporation but against them as well.

The holding in *Bevill* is too restrictive. Petitioners should not forfeit their right to the protection of an attorney-client privilege to which they would otherwise be entitled, simply because the discussion involved their corporate conduct. Rather, the existence of their privilege must be determined by application of the reasoning in *Westinghouse*. If the circumstances of the interview and the comments of counsel imbue corporate officials with a reasonable belief that they are supplying confidential information to lawyers who will be protecting their interests as well as those of the corporation, then the officials are entitled to the protection of the privilege.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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